[2015] JMCC Comm. 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2013 CD 00059

BETWEEN	**THE PROPRIETORS STRATA PLAN NO. 305**	**CLAIMANT**
AND	**GREATER WORKS INTERNATIONAL FELLOWSHIP**	**1st DEFENDANT**
AND	**ANTHONY RENALDO YOUNG AND LORENS JOY YOUNG**	**2nd DEFENDANTS**

Ms. Carol Davis instructed by Carol Davis & Co. for the Claimant.

Mrs. M. Georgia Gibson-Henlin and Ms. Kamau Ruddock instructed by Henlin-Gibson Henlin for the 1st Defendant.

The 2nd Defendant was unrepresented.

HEARD: June 16, 17, 18, 19, 20, July 10, 2014, October 10, 2014 and May 22, 2015

REAL PROPERTY – STRATA TITLE – BY – LAWS RESTRICTING USER TO OFFICE OR SHOPS – WHETHER CHURCH OPERATION IN THE MALL HAS RESULTED IN UNREASONABLE INTERFERENCE WITH USE AND ENJOYMENT OF COMMON AREAS BY OTHER PROPRIETORS – COMPLAINTS THAT CHURCH CAUSING NOISE AND OTHER NUISANCE – CONTINUING BREACH OF COVENANT USING SHOPS AS A CHURCH – CONTINUING DISPUTES OVER PARKING SPACES AND NOISE – STRATA RUN BY CORPORATION – WHETHER THERE WAS ACQUIESCENCE TO THE BREACHES BY THE EXECUTIVE MANAGEMENT COMMITTEE – WHETHER THERE WAS UNDUE DELAY IN FILING CLAIM – WHETHER CLAIMANT NOW DEPRIVED OF RIGHT TO ENFORCE THE BY – LAWS – WHETHER INJUNCTIVE RELIEF UNJUST IN THE CIRCUMSTANCES – REGISTRATION (STRATA TITLES) ACT SS.9 AND 18.

Edwards J.

BACKGROUND

[1] The Red Hills Mall (the Mall) located at 105 Red Hills Road, in the parish of Kingston, Jamaica, is the commercial strata property now at the centre of a dispute before the Court. The Claimant is the registered Strata Corporation named "The Proprietors, Strata Plan No. 305 (under the Registration (Strata Titles) Act (The Act) and is constituted of all the proprietors of this strata property. As such, the Claimant acts in a representative capacity for the individual strata unit owners. It is the Claimant that manages and administers the affairs of the strata property and all attendant powers to be exercised thereto are conferred on its Executive Committee.

[2] The 1st Defendant is a non-denominational 'prophetic ministry' which purchased lots in the Mall from 2005. It now occupies seven of the strata lots, which for ease of reference I will henceforth call units. The units involved are 24, 25, 26, 27, 28, 29 and 30. The 1st Defendant is the proprietor of units 27, 28, 29 and 30 and rents units 24, 25 and 26 from the proprietors of those units. The 2nd Defendants are the proprietors of unit 24. The four units owned by the 1st Defendant are used as a church. Units 25 and 26 are operated as an office and a bookshop, respectively and 24 is used as a meeting room and for Sunday school. Endorsed on the title for each proprietor are covenants made subject to the covenants endorsed on the strata plan 305.

[3] In 2013, the Claimant sought and obtained an interim injunction preventing the Defendants from using the units in the Mall as a church. That injunction was stayed pending the outcome of this trial. The Claimant is now seeking a permanent injunction to prevent the Defendants, and specifically the 1st Defendant from using the units as a church. The Claimant complained that the 1st Defendant was operating the church in breach of the by-laws of the strata property and the covenants on the title. The injunction being sought is to restrain this practice.

[4] In response to the claim, the Defendants counter-claimed that the Claimant had breached its statutory duty and/or that they had sought to enforce their statutory powers in an unfair and prejudicial manner. The Defendants sought a declaration from the court that it would be inequitable to allow the Claimant to enforce the by-laws with respect to the church, as they had acquiesced, and/or consented to the breach as to user thereby waiving their legal right to enforce the covenants. In the case of the 1st Defendant it claimed that it had used the units as a church continuously without objections since 2005 when it purchased its first lots until 2013. It also averred that the Claimant, by its conduct, had led it to believe that there was no impediment to the use of the units as a church, by reason of which the 1st Defendant acted to its detriment by establishing itself as a church in the mall.

The Submissions

[5] There were several submissions made on both sides. I will attempt to do justice to the submissions but in the interest of time and space I will only seek to summarize them as best as possible. The submissions of the 1st and 2nd Defendants being identical in nature, I will attempt a single summary.

The Claimant's Submissions

[6] The Claimant submitted that there had been and continues to be a breach of the by-laws of the strata property by the 1st Defendant operating a church in a commercial mall. It was submitted that the strata property is governed by the by-laws which were duly endorsed on the Strata Plan and on each title. It was noted that the by-laws, amongst other things, prohibited certain activities and governed the use of both the common property and the individual units. In particular, the Claimant averred that the by-laws prohibited the use of the strata units other than as an office or shop. Further, the Claimant contended that the continued use of the strata units in violation of the by-laws constituted a continuing breach, with each day giving rise to a new breach.

[7] The Claimant also submitted that by virtue of Section 9(8) of the Act, the by-laws are to be given the same force as the statute. In this regard, the Claimant urged the court to give effect to the by-laws by restraining the breach. The Claimant also submitted that as a matter of public policy, the by-laws must function as an agreement between the strata corporation and the individual proprietor. In this way the corporation was empowered to manage the property in the interest of all the proprietors. The Claimant further submitted that if the by-laws were not given this effect, proprietors would be able to ignore the by-laws and effectively make a mockery of such an arrangement.

[8] With respect to the delay in bringing a court action to remedy the breach, the Claimant submitted that at the time the 1st Defendant moved to the property, the strata management was "weak and ineffective" and it was not at that time aware of its right to take legal action to restrain the breaches of the by-laws. In those circumstances, the Claimant advanced that where it was not aware of its rights there cannot be said to be any acquiescence to the breaches.

[9] With respect to the 2nd Defendants in particular, the Claimant submitted that as proprietors they too were bound by the by-laws. It was argued that the 2nd Defendants were under a duty and ought to have advised the 1st Defendant of the by-laws. In light of these considerations, the Claimant urged the court to grant the permanent injunction restraining the Defendants from operating a church from the premises.

The Defendants' Submissions

[10] The Defendants have firstly submitted that the by-laws on which the Claimant relied on were void and of no effect. This, they claim, is so because there was no credible evidence that the by-laws were adopted by the strata in accordance with the provisions of the Act. Accordingly, they submitted that the true by-laws are those reflected in the 1st Schedule of the Act and it was those by-laws which regulate the Proprietors Strata Plan 305. It was argued that, if in

fact the by-laws were not amended in accordance with the provisions of the Act, they could not be enforced.

[11] The Defendants also submitted in the alternative, that the application for an injunction ought to be refused because the Claimant had led the 1st Defendant to believe that it had no objection to the use of the units as a place of religious worship. It was further submitted that the 1st Defendant had operated as a church at the said location for eight years before there was any complaint with regard to user and in those circumstances, the conduct of the Claimant would have encouraged and or acquiesced to the breach or waiver of the by-laws. The 1st Defendant contended that it had significantly improved on the units and as such they had relied on the Claimant's encouragement and acquiescence to their detriment.

[12] The 1st Defendant also advanced the argument that the attempt by the Claimant to restrain its use of the units as a church was oppressive and unreasonable. It alleged that the objections to the use of units as a church surrounded disputes relating to parking and noise. They argued that as a response to those disputes it had endeavored to co-operate to resolve those issues. It was submitted that parking could not be assigned in circumstances where the proprietors all held parking spaces as tenants in common. In response to the claim of noise nuisance, the 1st Defendant asserted that it had caused the units to be soundproofed in an attempt to ameliorate the level of the sound emanating from church activities. The Defendants asserted that in those circumstances, the Claimant's complaints were oppressive, without merit and ought to be dismissed.

[13] The 1st Defendant further alleged that the Claimant's true objection to its operation was in relation to the church's non support of the strata management's enforcement methods for the collection of maintenance.

The Issues

[14] There are a number of issues which are germane to the dispute between the parties to which the court must give consideration. It is important to note that both parties are in ad idem on the law which governs this dispute. Also, there are a number of undisputed facts. The issues raised in this case therefore, surround the proper application of the law to the facts at hand. The issues to be determined as I see them are:

1. Whether the by-laws are valid and enforceable;

2. Whether there has been a breach of the by-laws by the Defendants;

3. If so, whether the Defendants can rely on the defenses of acquiescence and or laches. If not, whether the 1st Defendant is entitled to the reliefs sought in their ancillary claim.

4. Whether a permanent injunction ought to be granted in the circumstances and to whom?

Are the by-laws valid and enforceable?

[15] The Defendants having taken issue with its validity, it must be determined whether the by-laws being relied on by the Claimant and which is at the heart of the Claimant's case, really does govern the operation of the strata property. The 1st Defendant in its ancillary claim had also averred that if and to the extent that the by-laws are covenants, they are personal and do not run with each lot, they therefore would only burden the original proprietors and the corporation.

[16] The starting point in resolving this first issue is the Act. Section 9 of the Act states;

> *"(1) Subject to the provisions of this Act the control, management, administration use and enjoyment of the Strata lots and the common property contained in every registered strata plan shall be regulated by by-laws.*
>
> *(2) The by-laws shall include-*

(a) The by-laws set forth in the First Schedule, which shall not be amended or varied except by a resolution passed by at least seventy-five percent of the proprietors;

(b) The by-laws set forth in the Second Schedule, which may be amended or varied by the corporation.

(3) Until by-laws are made by the corporation in that behalf the by-laws set forth in the First Schedule and the Second Schedule shall as and from the registration of a strata plan be in force for all purposes in relation to the parcel and the strata lots and common property therein.

(4)……………………………………………..

(5) No amendment or variation of any by-law shall have effect until the corporation has lodged with the Registrar of Titles a notification thereof in such form as may be prescribed and until the Registrar of Titles notifies the corporation that he has made reference thereto on the relevant registered strata plan.

(6) …………………………………………………

(7) Each proprietor shall give to a person in lawful possession of the proprietor's strata lot, a copy of the by-laws in force for the time being and any notifications lodged with the Registrar of Titles pursuant to subsection.

(8) The By-Laws for the time being in force shall bind the corporation and proprietors to the same extent as if such by-laws had respectively been signed and sealed by the corporation and each proprietor and contained covenants on the part of the corporation with each proprietor with every other proprietor and with the corporation to observe and perform all the provisions of the by-laws.

(9) ……………………………………………………

(10)……………………………………………………"

[17] It is clear from the above provisions in the Act that a strata property is to be governed by by-laws. The by-laws act as a deed of mutual covenant to which it is deemed that all proprietors of the strata are a party and it binds all the proprietors one with the other and with the strata corporation (s. 9 (8). The by-laws reflected in the first and second schedules to the Act represent the default by-laws which will govern all strata properties until amended or varied in accordance with the provisions of section 9.

[18] With respect to the amendment or variation of the default by-laws in the first schedule, there firstly needs to be a resolution passed by at least seventy-five percent of the proprietors (s.9 (2) (a). For the by-laws referable in the second schedule those may be amended by the strata corporation (s.9 (2) (b). The proposed amendment must then be lodged with the Registrar of Titles who will thereafter endorse the amendments on the strata plan and notify the corporation that this was done. By virtue of section 9 (8) the by-laws bind the corporation and the proprietors one to the other.

[19] Section 2 of the Act defines a proprietor as the proprietor for the time being of a strata lot. It defines a corporation as meaning, in relation to any registered strata plan, the body incorporated by section 4. Section 4 (1) provides that;

> *"4.-(1) The proprietors of all the strata lots contained in any strata plan shall, upon registration of the strata plan, become a body corporate (hereinafter referred to as "the corporation") under the name "The Proprietors, Strata Plan No. "(with the appropriate number of the strata plan inserted in the blank space).*
>
> *(2) The corporation shall have perpetual succession and a common seal and be capable of suing and being sued in its name."*

The executive committee is defined under the Act as the executive committee of the corporation constituted under the first schedule.

[20] The Defendants argued that the validity of the amended by-laws was not only questionable but there was no evidence that it was an amendment in accordance with the Act. They therefore rely on the default by-laws in the 1st schedule as the governing by-laws. The by-laws in the 1st schedule in paragraph1 (d) and (e) has the same restrictions in the same form as (d) and (e) of the amended by-laws. It however contains no restriction on the use of the lots. Schedule 2 paragraph 1 (b) carries a restriction on noise nuisance but interestingly paragraph 2 of schedule 2 provides a restriction on the use of the lots, where the intended use of the strata lot is shown either expressly or by necessary implication on or by the registered strata plan. If the amended by-laws are not valid the governing by-laws would be the default by-laws which appear in the first and second schedule to the Act.

[21] Having perused the exhibits in this case, several things are noteworthy. Firstly, the 1st Defendant's titles to the purchased lots were exhibited to the court. Each title carries an endorsement as to the encumbrances registered on the title and the only one referred to was the endorsement that the proprietor holds the lot and his shares in the common property subject to any interest affecting it, notified in the registered strata plan and subject to any amendments to the strata lots or common property shown on the strata plan.

[22] Secondly, it is equally noteworthy that the certified copy of the Strata Report Plan for Strata Plan No: 305 with the by-laws endorsed thereon was exhibited. Attached to the plan was a sheet titled "annexure to sheet of strata plan no 305, Registrar of Titles" and on it was a schedule of encumbrances. It showed that by miscellaneous instrument no. 97189 dated 10/8/87, there was particularized a variation of by-laws (annexure "B" 1-8 entered 6/4/88 duly noted on the strata plan report for 305 by the Registrar of Titles who was then Mrs.

Andrade and stamped ‘Office of Titles’. In my view, this is prima facie evidence that at some point the default by-laws in the Act had been amended and the amendment lodged with the Registrar of Titles who subsequently endorsed it on the strata plan as per the provisions of the Act. At the very least it raises a rebuttable presumption that the amendment was made and endorsed in accordance with the Act. The by-laws were therefore duly endorsed on the certificate of title for strata plan 305 and registered as miscellaneous 97189, the strata plan itself having been registered as miscellaneous 86805 at lodgment 31/1/1985.

[23] This I view as notice to the world that the default by-laws had been amended. The by-laws endorsed on the plan by the Registrar of Titles in accordance with section 9 of the Act are the by-laws which govern the strata 305. I do not believe that this court needs to go behind this endorsement to find proof that the resolution making the amendment was by the requisite majority.

[24] Though the Defendants have raised objections to the validity of these by-laws, there has been no concrete or specific basis upon which the by-laws have been challenged; save that they were not amended in accordance with section 9 of the Act and were not done by “the corporation”. Despite this, the Defendants have not contested that the by-laws are endorsed on the Strata Plan. Instead they challenge the validity of the resolution to amend. The evidence is that by a resolution dated 1987 the proprietors of strata plan No. 305 resolved to adopt by-laws to govern the strata.

[25] There is no evidence of the resolution itself coming from the Claimant. It very early abandoned any reliance on it due to the fact that they were unable to produce the original or any certified copy of it to the court. However, Mr. George Johnson on his evidence to the court indicated that a copy was handed to him shortly after his purchase and having been asked by the court to produce it, he did so and it was admitted as an exhibit without objection. The Defendants

objected to the court relying on it as proof of the validity of the by-laws however, because admittedly, though signed by a director and secretary as well as members of the executive committee of the strata, it does not carry a month or a date but only the year 1987 and was under the common seal of Jamaica Mutual Life Assurance Society. It was also a copy. As it turned out it was also not the best evidence available to the court of the resolution. In the face of the objection by the Defendants, I did not need to give any weight to it and it was not necessary to do so as the plan endorsed the amendment as required by law and the amendment became effective at its endorsement.

[26] However, as it turned out, the 1st Defendant provided evidence of the resolution and the endorsement on the plan which were certified copies from the Office of Titles. They provided not only the annexure but also the certified copy of the resolution dated 10th August 1987 lodged with the Register of Titles. It was from this that the endorsement on the plan was recorded as miscellaneous 97189 annexure b 1-8. With the exception of the dates and the hand written endorsement from the titles office, it is in the same form as that produced by Mr. George Johnson. However, the Defendants asserted that despite its existence it was not the corporate resolution of the Claimant and therefore it was not a valid amendment.

[27] However, on this point the Defendants have failed to recognize that the resolution was the resolution of the proprietors for the time being and therefore valid according to the provisions of the Act. Section 2 of the Act defines a proprietor as the proprietor for the time being of a strata lot. Corporation is defined as the body incorporated by section 4. Section 4 states:

> *"4.-(1) The proprietors of all the strata lots contained in any strata plan shall, upon registration of the strata plan, become a body corporate (hereafter referred to as "the corporation") under the name "the proprietors, strata Plan No " (with the appropriate number of the strata plan inserted in the blank space)*

> *(2) The corporation shall have perpetual succession and a common seal and be cable of suing and being sued in its name."*

[28] To say therefore, that the resolution passed in 1987 was not the Claimant's resolution is a fallacy. The evidence from both sides which none challenged or disputed was that Mutual Life Assurance Society were the first proprietors. It was they who eventually sold the individual units to their successors in title. At the time of the registration of the strata, Jamaica Mutual Life Assurance Society was the sole proprietor of all the lots. Therefore at the registration of the strata that sole proprietor became the body corporate by virtue of section 4. The Act calls for a resolution by 75% of the proprietors to amend schedule 1. The resolution presented to the court stated that the Proprietors Strata Plan no. 305 unanimously passed the resolution. That was then Jamaica Mutual Life Assurance Society. The resolution was signed by two persons purporting to be members of the executive committee. The first and original proprietors at the time having been Mutual Life Assurance Society, then it could only be they who formed the corporation and from whom the members of the executive committee would be formed. It must also follow that it would be they who passed the resolution to amend schedule 1.

[29] For fear that I might again be stating the obvious, I will state for emphasis only that Jamaica Mutual Life Assurance Society having been the first proprietors and having registered the strata under the law they also formed the corporation. So that under section 9 they were validly permitted to amend the by-laws in schedule 2 also. The resolution therefore referred to both amendments made by the proprietors and the corporation. The fact that it was made under the seal of the Jamaica Mutual Life Assurance Society could only mean that they being the sole proprietors chose to adopt that seal to be used as the common seal of the corporation at the time. It does not in those circumstances prevent the resolution from being the resolution of the proprietors' strata plan 305.

[30] The relevant by-laws which are endorsed on the strata plan 305 by the Registrar of Titles states as follows:

1. A Proprietor shall

(a) ………………………………………………………..

(b) ………………………………………………………..

(c) ………………………………………………………..

(d) Use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other proprietors or their families or visitors;

(e) Not use his strata lot or permit it to be used in such manner or for such purpose as shall cause a nuisance or hazard to the occupier of another strata lot (whether a proprietor or not) or the family of such occupier.

2. A Proprietor shall not:-

(a) Utilize his Strata lot for any purpose other than as offices or shops.

(b) …………………………………………………………

(c) …………………………………………………………

(d) …………………………………………………………

(e) Make such noises or use musical instruments, radios, televisions, and amplifiers in such a manner so as to disturb other proprietors, residents or guests in the building.

[31] I find that the by-laws which are endorsed on the strata plan are valid and enforceable. The further evidence is that the by-laws endorsed on the

strata plan were ratified by the proprietors at a general meeting held September 12, 2012 where they voted by resolution not to amend those by-laws.

[32] The Defendants also asked the court to find that the by-laws did not run with the land. This contention brings me to the third of my noteworthy observations upon perusal of the documents. The original title held by Jamaica Mutual Life Assurance Society, which was the developer for the mall, also carried a restrictive covenant on the user of the lots. It was they who registered the mall as a strata and it was clearly the intention that the covenant would be binding on all the proprietors.

[33] Therefore, the short answer to the Defendants contention is that the mall is a strata scheme which operated in a manner as I earlier indicated. It therefore, operated by statutory provisions to bind all the proprietors, heirs and assigns whether original or those who came after. In any event, if that is not a sufficient answer, the Defendants' titles also carried the encumbrance which was subject to the provisions of the Act, which includes the by-laws in the schedules and any amendment thereto and was clearly intended to run with the land. The Defendants' submission on this point is therefore unsustainable.

Are the Defendants in breach of the by- laws?

[34] Though I disclaim any notion that I am an authority on strata schemes, my understanding of the nature of the strata arrangement is that it creates a local law evincing an intention that all purchasers of a strata unit are bound by the restrictive covenants, such that each proprietor is able to enforce them against the other, through the corporation. This local law bypasses all the ordinary rules of contract and covenants between proprietors and creates a system of mutual enforceability. Though the strata scheme is a legal fiction, it is consistent with the legal and equitable rules governing the enforceability of restrictive covenants in a scheme of developments.

[35] The nature of the strata management is that it is representational, that is, the strata is managed by an executive committee comprised of elected members from amongst the unit owners, who manage the strata on behalf of all the owners. This means that executive membership may change overtime, as may the unit owners. However, the corporation itself has perpetual succession. The current executive therefore, was not the management in place when the church first entered the mall. It is against that background that I will go on to consider the remaining issues.

[36] A great deal of evidence was heard in this matter over several days. I think it best to summarize the evidence from both sides which was relevant to this issue, as shortly as possible as I go along. Mrs. Lee-Hendrickson gave evidence on behalf of the Claimant. She has been a member of the executive management committee of the strata since 2010. She is also affiliated with the supermarket which is one of the proprietors in the mall. She has been present in the mall as a representative of the supermarket since 1992. She flatly denied the 1st Defendant's claim that the strata manager Mr. Gabbidon, gave or was even in a position to give, permission for the church to operate in the mall with the exception of the conduct of funeral services and the presence of caskets. Evidence was also given by Mr. Ronald Chai who is a director of the supermarket. It is a family owned business. He is perhaps certainly related to Mrs. Hendrickson.

[37] Mr. George Johnson, who owns and manages the pharmacy, also gave evidence for the Claimant. Mr. Johnson has been in the mall since 1976. He bought his unit from Jamaica Mutual Life Assurance Society which gave him his title and by-laws. He was given a copy of the by-laws in 1988. At that time the types of business in the mall were banks, supermarkets, dentist offices, doctors' offices, clothing stores and furniture stores. There were no schools or churches in the mall at the time. He only became aware that the by-laws prohibited the

use of a church in 2010-2011. Although he had received a copy of the by-laws he never read it.

[38] As previously stated, the use of the mall is regulated by by-laws as set out above. The 1st Defendant has not denied that it operates a church from the some of the units it occupies, although it denies that the 2nd Defendants' unit is so used. In the operation of a church, there is attendant singing, praying, preaching, use of musical instruments and other activities which flow from this conduct. These facts are not in dispute. The court accepts these facts as true. When taken with a reading of paragraph 2 of the by-laws, it is clear that the use of the units as a church, with its attendant activities, is inconsistent with the restrictions contained therein.

[39] The Claimant submitted that not only is the 1st Defendant in breach of the by-laws as to the general user but that its very presence in the mall operates as a nuisance. The main dispute as to the church's attendant activities relate to the issues of noise and parking. The evidence is that there are 150 parking spots in the mall which only became inadequate because of the presence of the church. For the evening services and on Sundays, most of the spaces are occupied by the members of the church leaving very little for the patrons of the other proprietors. The 1st Defendant gave evidence that parking was generally a problem at the mall as the facilities were insufficient to service all the proprietors of the mall.

[40] Added to that inconvenience, the Claimant's evidence was that there was the attendant noise, children roaming freely up and down the mall and messing up the mall which was a direct result of the operation of the church. The evidence of Mr. Johnson is that there has always been noise from the church activities which worsened in 2008 when an amplifier was installed and the church expanded. He spoke to the manager of the strata about his concerns.

Complaints were also made by other proprietors and the noise level was turned down but it still remained a nuisance.

[41] As to the allegations of the making of noise so as to disturb and cause a nuisance to the other occupiers of the strata, it is of note that the Defendants do not deny that there was noise emanating from the operation of the church at the mall. In fact, the 1st Defendant stated that the noise did not rise to the level of nuisance and there have also been efforts put in place to ameliorate the level of noise by soundproofing the units. The 1st Defendant further contended that church activities were not conducted every day and not at hours which would affect the other proprietors', patronage except for those opened on Sundays.

[42] It was also alleged that the 1st Defendant caused the common area and more specifically the car park to be used in such a way that unreasonably interfered with the use and enjoyment of it by the proprietors and their visitors. It was alleged, in particular, that some proprietors lost potential revenue due to problems with parking. Those particularly affected were the supermarket and the pharmacy which operated on Sundays when church was in session at which time the limited parking space becomes the subject of contest.

[43] The Claimant averred as well, that it was the presence of the church in the mall which led to a down turn in business especially on Sundays. The mall is usually open on a Sunday, which it was claimed was now a big shopping day in Jamaica. The witness Mrs. Hendrickson told the court that the sales at the supermarket dropped by 25-35 percent due to the operation of the church on Sundays.

[44] This was contradicted by the Defendants who said the downturn in the mall was as a result of violence in the area and that the presence of the church had actually assisted in alleviating the rise in criminality in the area because of the work of the church in the community. The witnesses for the church claimed

that there was a down turn in business at the mall about eight years ago when the bank moved out of the mall and there were riots in the area. The mall is situated close to several depressed communities.

[45] They also claim that the presence of Price-Smart and Lees Food Fair could also have been a contributing factor to the downturn in sales. The downturn also led to some proprietors getting together to give the mall a facelift in an effort to revive its flagging fortunes.

[46] The Claimant's witnesses gave evidence that the presence of the church affected sales on Sundays, Mondays, Wednesdays and Fridays. The supermarket sales were affected between 6-9pm when both the church and the supermarket were functioning. There was competition for parking. The supermarket sales used to be better after 6pm because of those customers who would come after leaving work but not anymore due to the inconvenience in getting parking spaces. Parking is on a 'first come first serve' basis in a commercial mall with the average customer time spent being ½ to 1 hour. The members of the church however, each occupy a parking space for hours at a time.

[47] On the days the church was not in operation there was adequate turn over and space was not in short supply. There was a concern about the church's attitude of non-cooperation and there was a decision to uphold the by-laws and not amend it to accommodate the church.

[48] There was evidence from a Mr. Charles Jackson from a management company which managed the property at some point but his evidence was significant only for its general unhelpfulness.

[49] The 1st Defendant's witnesses gave evidence that the units used as a church was soundproofed so there was no nuisance. The church however, did

use amplifiers and its members did speak in tongues from time to time. They also gave evidence that the church only operated on Mondays for bible studies at 6pm, Wednesdays at 6pm, third and last Fridays at 6pm and 11pm, respectively and on Sundays.

[50] The evidence is that on Sundays, the average attendance to worship service was 500 people, about 20% of whom drive. The parking lot is usually full. The parking is usually marshaled by a church member. They claimed that after the membership park about 1/3 of the parking is left for others. On Mondays and Wednesdays it is 80 persons. On Fridays two separate meetings are held; one has an average attendance of 80 the other 100 persons. There are taxis which also park at the mall and at the main entrance to the supermarket.

[51] The 1st Defendant's witnesses also gave evidence that its presence in the mall has contributed to a reduction in crime. There were weddings and sometimes concerts and fund raising events but no funerals. There were, sometimes, community treats held by the church in the common area.

[52] They also claimed that they had cooperated with parking in that they were asked to park at the back which they did, then they were asked to park at the front which they did. Meetings had been held to ask the church to restrict parking which it did. They stopped co-operating when there was an attempt to allocate and mark out designated parking which was illegal in a mall. This was after a meeting with the strata commission. However the church reserved one spot for itself with the use of a cone.

[53] With regard to the lease of the 2nd Defendant's unit and its use, the evidence from the Claimant is that the operation of the church in the mall was always an issue, especially since it occupied all of seven units. Church was held in five of the units, one was used as an office and one as a bookshop. The one rented to the church by the 2nd Defendant was used as a Sunday school and

meeting room. The Claimant denied that it was used as an administrative office as it had no desk or chairs indicative of an office only plastic chairs which were moved around in the same way as those in the other units used as a church, that is, units 27-30. The evidence of Mrs. Hendrickson was that she had been in that unit for meetings but prior to 2012 had not officially objected to its use as a church.

[54] The evidence given on behalf of the church came from Mr. Griffiths and Mr. Cunningham. Mr. Griffiths told the court that from the outset the strata manager Mr. Eaton Gabbidon, who was in place in 2005, knew that the units had been purchased to be used as a church. He indicated that 2 units had previously been rented by the Universal Church of God prior to being purchased by the 1st Defendant. There had been no objection to that church operating in the mall. The 1st Defendant indicated that the Claimant had and continued to collect maintenance from it without raising any objection to it operating as a church.

[55] Evidence was also given by Mr. Cunningham that the church took possession of units 26 and 27 in 2005 and started work on them. The evidence was that the 1st Defendant participated in the Claimant's management and administration of the strata without reference to any breaches. It had a nominee on the executive at some stage. The evidence from the 1st Defendant was that from the outset it operated a church at the mall and all the units, save one, were so used. One unit it claimed was used as a meeting room and holding area for children after Sunday services.

[56] The 1st Defendant's evidence is that units 26, 27, 28, 29 and 30 are all used for church. Units 26 and 27 were once used by Jencare Skin Farms. Lot 24 which is the 2nd Defendants' unit was used as a meeting room for church and the strata. It was not used as a shop or an office.

[57] Mr. Young gave evidence on behalf of the 2nd Defendants. He gave evidence that lot 24 was owned by his wife and himself. They rented it to the church to be used as an office and training center and as such they were not in breach. He alleged that even if there was a breach of the by-laws as to nuisance he could not be held liable as the landlord for his tenant's breach. For this supposition he relied on the case of **Mowan v London Borough of Wandsworth & another** CCRT1/2 2000/2171/B1 unreported. In that case, the principle relied on was that the person to be sued in nuisance was the occupier; that in general, a landlord was not liable for nuisance committed by his tenant. I am not entirely certain that the 2nd Defendants are on firm ground in this regard, since the by-laws makes the proprietor liable for any breaches.

[58] The 2nd Defendants have always rented out unit 24. Mr. Young has not been to a meeting of the strata since 2000. He does not know anything about the noise nuisance. He said he started renting to the church in 2007 and there was no issue. The mall was vacant with a lot of shops empty and the mall needed an influx of funds to carry out works. He considered that at least the church was coming with funds to assist with the maintenance. He was of the view that the Claimant did embrace the church. He said the problem with access to the mall was not with parking but with the fact that it was an indoor mall which was not attractive to customers.

[59] He got his unit from Jamaica Mutual Life Assurance Society also but cannot recall seeing any by-laws. He certainly had not read any. He rented unit 24 to the church to be used as an office for training. He said he had a tenant there who used it for four years conducting training and he thought the church would do the same thing. He thought it would be a meeting room. He does not pay maintenance as he cannot afford it since it was not the only expense in his life.

[60] It was agreed that the 1st Defendant received the by-laws on their entry into the mall in 2005. They came in and were handed the by-laws. There was no agreement that they were aware of the contents of the by-laws, however they agreed that, if the by-laws were valid, they were operating in breach of user.

[61] I accept that there was in fact noise emanating from the church activities being conducted by the 1st Defendant. I am also convinced that the noise was of such frequency and level as to disturb the quiet enjoyment of the other proprietors. Contrary to the submission by counsel for the 1st defendant, I do not accept that this requires evidence from a noise expert. In fact, the evidence of the witnesses of the 1st Defendant was that steps were taken to soundproof the units in a bid to ameliorate the level of noise. I find this concession, in and of itself, to be an acceptance by the 1st Defendant that its church activities generated an unacceptable level of noise.

[62] Sound proofing the units may very well have resulted in a significant reduction in the noise level. However, noise is noise from whatever quarter it emanates be it dancehall or church. The kind of sustained noise from church related worship experience must be disconcerting in a mall setting both to proprietors and their customers. I am also mindful of the fact that this is an enclosed mall. The times of which the Claimant complained on Sundays, when some shops are opened and the sessions held on the two nights during the week, would, according to the evidence, have certainly begun in the late evening when some proprietors would be expecting after-work walk-in customers.

[63] Even if the noise level had been ameliorated to an acceptable level, the Defendants would still be in breach simply by virtue of the operation of a church in the mall in contravention of the by-laws. With respect to the parking, it was accepted by both sides that parking cannot be zoned in a commercial mall. There is a commonsense reason for this. Each proprietor is entitled to the same chance to have customers come and park to patronize their services. The

expectation is, however, that there would be a high level of turnover. Where there is an issue with inadequate parking and one proprietor conducts an operation where parking was not only in large numbers but there was also no rapid turnover, then that proprietor has an unfair advantage. This could rise to the level of unreasonable use and a nuisance to the other proprietors. This is especially significant in a mall which is said to have 30 shops and approximately 100 parking spaces.

[64] Though I accept on authority that at common law the 2nd Defendants are not liable for the nuisance committed by their tenant, they are liable for the breach of the by-law for permitting their strata lot to be used "in a manner or for such purpose as shall cause a nuisance or hazard to the occupier of any other strata lot". I also do not accept that they did not know that their unit was being used other than as an office or shop. I find that they are equally liable with the 1st Defendant for the breach of the by-laws.

Can the Defendants rely on the defenses of acquiescence or laches?

[65] The Defendants in their defence have asked the court to find that even if they were in breach of the by-laws, the Claimant, by its conduct, had acquiesced to the breach or in the alternative it is subject to laches and thereby are estopped and have lost the right to enforce the by-laws.

[66] As have already been pointed out, the covenants on the individual titles were made expressly subject to the by-laws and the by-laws themselves were entered into for the mutual benefit of all proprietors. These covenants expressed as negative covenants where there is mutuality, are binding on all the proprietors. The common law principle is that the court is bound to give effect to negative covenants unless the Claimant has become, by its own action, disentitled to sue on it. The Claimant's conduct or omission may be such as to make its reliance on the covenants contained in the by-laws manifestly unjust.

[67] In this case, the Claimant denied that it was negligently late in its claim or that it had acquiesced or waived any of the breaches and asserted that it took action as soon as it was reasonably practical to do so.

[68] This is a claim where the Claimant has a right to sue at law. By statutory operation, each purchaser and all subsequent purchasers are deemed to have entered into such covenants with the corporation and each other and therefore are bound. In that regard the scheme of the strata is different from the common law. Equity will follow the common law and statute unless it is being used as a basis for fraud.

[69] The Claimant asserted, in reliance on the case of **Equitable Life Assurance Society of the United States v Reed** [1914] AC 58, (PC) that the by-laws pursuant to the Act had the same force as statue and as such the parties could not contract out of or waive its provisions. In that case a provision of the Life Insurance Act of 1908 of New Zealand provided that no policy shall become void merely by virtue of non-payment of premium so long as the arrears were not in excess of the surrender value, as declared by the company. The Privy Council held that the provision was intended to lay down a rule of public policy and that it was not competent for either the assured or the assurer, to contract out of or to waive its provisions.

[70] In this case where the strata by-laws have the binding force of statute it is doubtful that equity can provide relief from the enforcement of the provisions because of delay or acquiescence unless the statue is being used to perpetrate a fraud. The by-laws are prohibitory and the Act provides for the way in which the prohibitions may be changed, that is by resolution. It is therefore not open to the parties to effect changes by incorporating legal and equitable principles into the operation of the Act. Neither is it open to the corporation, through its executive committee, acting on behalf of all the proprietors present and future, to

waive any of the provisions of the Act or by-laws or acquiesce to any of its breaches.

[71] I make bold to assert myself that the provisions of the Act have been carefully devised as a matter of public policy and its provisions cannot be waived or contracted out of. It is precisely because the strata is a legal fiction which imposes benefits and burdens on all proprietors, past, present and future, their heirs and assigns, but gives the management, administration and control of the strata, not to individual proprietors but to a corporation, why the provisions have to be viewed as a matter of public policy. For instance, if there is a breach of the by-laws as to use, it is the corporation which must act against the offending proprietor. The aggrieved proprietor may only complain to the corporation but they individually have no cause of action against the offender for the breach of user. Section 18 refers to an application to the court by the corporation for an injunction for breaches and makes no reference to an application by a proprietor. It also refers to a pecuniary penalty to be paid to the corporation and not damages. It follows therefore, to my mind at any event, that to allow delay and acquiescence by the corporation to bind proprietors present and future to accept unwanted changes to the strata would be against public policy and the spirit and letter of the statute.

[72] The statute has to be viewed in its historical context to understand the public policy considerations behind it. With the advent of changes in the way persons were developing schemes with shared private and public spaces with common areas, common stairs, elevators, lawns and roadways all of which require constant monitoring and maintenance, in a legal atmosphere which required neighbours to sue each other to enforce covenants which were seldom observed, a more workable legal solution was required to regulate these evermore emerging schemes. The result was the strata legislation. It introduced a system of titles with the ability to attach covenants in the form of by-laws which were able to run with the land and which were not enforceable by neighbor

against neighbor but by a corporation which it created. The Act provides a full procedure on how a strata scheme is to be governed and how breaches are to be dealt with and the rights and obligations of the parties involved. I do not believe that it is necessary to go outside of the provisions of the Act and apply equitable principles except to the extent allowed by the provisions of the Act as in section 18.

[73] I believe that I am on firm ground in taking this stance but in the event I am wrong and delay and acquiescence are pleas which are open to the Defendants against the enforcement of the statutory provisions, I will consider the equitable principles governing this defence.

[74] Where a litigant seeks equitable relief but has acted without reasonable diligence, the relief sought may be refused on the basis of laches or delay. Laches is an old French word meaning negligence, slackness or failing to do. Laches is a defence which has been defined as negligent inactivity which may result in a party being barred from equitable relief where he has not acted with utmost promptitude (see **Partridge v Partridge** [1894] 1 Ch 351 at 360). Equitable principles provide that in certain circumstances, where a party has sat upon its rights for an inordinate length of time, it would be inequitable to allow that party to later enforce that right. Whether or not equity will assist is to be determined by the particular facts of the case. In such a case the conduct of the parties and of the Claimant in particular, is taken into account. Hence the maxim delay defeats equity.

[75] However, there are divergent authorities on the issue of how delay is applied. One view point is that mere inactivity cannot result in a defence of delay where a perpetual injunction is being sought. It has also been said that laches is no defence to such an application, see **Archbold v Scully** [1861] 9 H.L. 360 at pp 376 to 383. In **Kelson v Imperial Tobacco Co. Ltd** [1957] 2 QB 334**,** a delay of seven years did not prevent a mandatory injunction being granted to stop a

trespass. In **Fullwood v Fullwood** [1878] 9 Ch. D 176, it was held that a delay of three years was no defence where the claim was not statute barred on the grounds that mere lapse of time without acquiescence was no bar. In **H.P. Bumer Ltd & Showerings Ltd v Bollinger S.A**. [1977] 2 C.M.L.R 625 C.A. an injunction was granted for a continuing wrong against a legal right and the court expressed the view that in such a case the delay had to be inordinate for the defence to succeed. This was a thirty year delay but advice had to be sought and various interests consulted and in those circumstances the delay was held not to be inordinate.

[76] On the other side of the spectrum it has been held that mere lapse of time was a bar, see **Brooks v Muckleston** [1909] 2 Ch 519. Delay may be considered in some cases where there would be substantial hardship or substantial prejudice to the defendant or the rights of third parties. Lord Blackburn in the case of **Erlanger v New Sombrero Phospate** [1873] 3 App Case 1218 at 1279-1280 set out the approach a court should take in applying the doctrine of laches. He stated that:

> "*From the nature of the inquiry it must always be a question more or less depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it.*"

This approach was applied by Laddie J in the fairly recent case of **Nelson v Rye** [1996] 1 WLR 1378.

[77] Delay alone in the absence of a statutory period of limitation may not be enough to prevent a claimant from getting his relief. In most cases it may be necessary to establish that, as a result of the circumstances of the delay, it would be unfair for the court to grant relief; see **Lindsay Petroleum Company v Hurd** [1873] 5 App. Cas. 221, per Lord Selbourne at p. 239; where a delay of fifteen months was held to be insufficient. It is clear from the authorities that

short periods unaccompanied by acquiescence will not be enough. In **Weld v Petre** [1929] 1 Ch 33, the English Court of Appeal held in the context of a redemption of mortgage that 18 years was not enough, the outer limit being twenty years, in their view.

[78] Further, where a claimant delays in bringing a claim, the courts may also infer that the claimant had acquiesced in respect of his claim or was indifferent to the violation of his rights; see **Chatsworth Estates v Fewell** [1931] 1 Ch 224. Such a claimant would be regarded as having waived his rights by his conduct and would be estopped from enforcing them. In **Chatsworth** the defence was that the character of the neighborhood had changed making the covenants valueless. Farwell J in holding that the covenant still had value, ruled that the person who protects his property by covenants cannot be deprived of his rights under the covenant because of the acts or omissions of others unless it resulted in a state of affairs which rendered the covenants valueless, so that any action to enforce them would not be bona fide and would be without merit.

[79] The case of **Shaw v Applegate** [1977] 1 WLR 970 is also instructive. There, the defendant had used his property for the running of an arcade in breach of a restrictive covenant. The claimant knew of the breach and raised no objections for six years. Acting on this tolerance, the defendant bought and installed more machinery for the arcade. The Court of Appeal held that the claimant's claim for a mandatory and prohibitory injunction concerning the use of the property as an arcade was not barred on the grounds of acquiescence. However, the claimant's conduct was such as to cause the court to refuse an injunction and grant damages instead. Buckley JA in considering the five principles laid down in **Wilmot v Barber** [1880] 15 Ch 96, and in deciding that all five need not be present, noted that acquiescence would not deprive a man of his legal right unless it was of such a nature as would make it dishonest and unconscionable to set up that right after the events that occurred. He said that the real test must be whether on the true facts the situation had become such

that it would be dishonest or unconscionable for the person having the legal right to continue to seek to enforce it.

[80] In **Wilmot v Barber** the court was considering whether the conduct of the defendant in that case amounted to proprietory estoppel. It was famously held by Fry J that there could be no proprietory estoppel unless:

1. The person claiming it had made a mistake as to his legal right;
2. He had expended money or done acts on faith of that mistake;
3. The possessor of the legal right knew of the existence of his legal right which was inconsistent with the equity.
4. The possessor of the legal right knew of the other persons mistaken belief;
5. The possessor of the legal right encouraged the other person in the expenditure of his money or doing of other acts on which that person relied directly or abstained from asserting his legal rights.

The court held that where all five factors exist, there was a fraud of such a nature as would entitle the court to restrain the possessor of the legal right from exercising it.

[81] By way of contrast, the court in **Osborne v Bradley** [1903] 2 Ch 446, found in essence, that despite prior minor breaches of a covenant and or acquiescence so to do, or even changes in the character of a neighborhood, a covenatee is still entitled to enforce a covenant in equity where there was no delay or acquiescence, where this later breach is substantially different from the earlier breaches for which there had been knowledge and no objection. Also where the earlier breaches were of insignificant character, acquiescence to those did not bar relief against more serious breaches later on (see Shaw v Applegate and the cases cited therein). Further, it has been held that where there are continuing breaches of a covenant as to user by a tenant, there is a new breach each day, giving rise to an actionable breach on each occasion (See **Segal Securities Ltd v Thoseby** [1963] 1 Q.B. 887 at p. 900). This is of

course in reference to breaches of a covenant as to user in a rent agreement. There seems to be no good reason or authority why this guiding principle would not be applicable to the breach of covenant as to user by a proprietor in this situation. I am therefore, prepared to find that the use of the units as a church is a continuing breach giving rise to a renewable right of action each day of the breach, in any event.

[82] It is clear that it is possible to have delay without acquiescence and acquiescence without delay but the courts are more likely to apply the defence where there is delay coupled with acquiescence. Having regard to the foregoing authorities, it is clear that if the defence is to succeed the Defendants must show that there was an express or implied representation by the Claimant that it would not strictly enforce the covenant in circumstances where it knew it had the right to do so, that they knew or ought to have known that there was a possibility that the Defendants would rely on this representation to their detriment and the Defendants having relied on the Claimant's representation to their detriment, have been thereby prejudiced by it.

[83] In this case the 1st Defendant had been in breach of the covenants for at least eight years before the Claimant sought enforcement. In the mean time the church had become larger both in physical size and in its membership. That is undeniable. The Claimants aver it was not so much a problem in the early periods but I since became larger. It had acquired more units by outright purchase and three by lease. It had paid maintenance and participated in the executive management of the strata. The issue is whether this failure by the corporation to seek to enforce the by-laws constituted a waiver of and acquiescence to the breaches.

[84] On the issue of laches the principle seems to be that where there has been unreasonable delay by a claimant resulting in substantial prejudice or detriment to a defendant, the equitable relief sought ought to be refused in the

interest of justice. In such a case the length of the delay and the actions or changes relied on by the Defendant during the period, the extent to which the Defendants' positions had been prejudiced by the delay and the extent to which that prejudice was caused by the Claimant's actions is of relevance in weighing the balance of justice in granting or refusing a remedy.

[85] In **Shaw v Applegate** the principle was expressed in terms of a test whether upon the facts of a particular case the situation had become such that it would be dishonest or unconscionable for the Claimant seeking to enforce a right to continue to seek to enforce it. (pp. 977-978). That court found that the breach of covenant not to use the property as an amusement arcade was a single indivisible but continuing breach for which there was insufficient acquiescence to bar all remedy or deprive the claimants of any continuing cause of action. This test was adopted in **Gaffford v Graham** [1999] 77 P &C.R 73. That was a case where there was held to be both delay and acquiescence making it unconscionable for the possessor of the legal right to be allowed to enforce it. The claimant was found to have known of his rights with respect to the erection of a bungalow and a barn in breach of a covenant but did nothing about it. The court found that the delay and acquiescence barred all relief including damages.

[86] In respect to the erection of a riding school the court found that there was no acquiescence but the delay in seeking interlocutory relief proved to be an important factor. The court found that a person who had clearly enforceable rights known to him and the ability to enforce them and who stands by and views an unlawful structure being permanently erected, ought not to be granted an injunction to pull it down. Whilst it was oppressive to grant an injunction, damages were awarded instead. An important feature of this decision however, is the courts finding that acquiescence to minor infractions does not entail acquiescence to a larger business. In that regard the court had this to say:

> *"It is very difficult to see how acquiescence in the business of an outdoor riding school up to 1989 could amount to acquiescence in the much larger business of an indoor and outdoor riding school after that date."*

[87] In the case of a permanent injunction a greater degree of delay and acquiescence is required to defeat the Claimant's right. In **Blue Haven Enterprises Ltd. v Tully and Another** [2006] UKPC 17 the PC considered what conduct would suffice to ground estoppel by acquiescence so as to deprive a party of its legal rights. It affirmed that no party would be deprived of their legal right unless it would be unconscionable or fraudulent to enforce those rights.

[88] What is the evidence in relation to acquiescence and laches in this case? The Claimant contended that they were not aware of their right to enforce the covenant and that in any event in the earlier period the church was small and not so much a nuisance to the other units as it is now. The evidence of Mr. Johnson was that he became aware of the presence of the church after they had already purchased the lots. He was unaware that he could have objected at the time and he had concerns regarding noise and funerals.

[89] He said changes began in the mall and the furniture store moved out. The units were sold and rented to the Universal Church. That was said to have been a small operation hardly noticeable in presence and there was no noise.

[90] The evidence of Mrs. Hendrickson was that prior to being on the executive she was not aware that there was a church in the mall. She certainly was not on the executive at the time of the 1st Defendant's entry to the mall though she conceded that a family member and representative of the supermarket had been. She was not full time at the supermarket neither was she physically present there before 2010. Before 2010 there was no executive committee only a strata manager in the person of Mr. Gabbidon. She said

although the church became a nuisance since 2008 she was unaware of the by-laws until 2012.

[91] The Claimant's evidence is that there was always objection to the church's presence in the mall and several meetings were held to resolve the issue. Despite these objections the church continued its expansion in the mall creating a greater nuisance to the other proprietors. The Claimant also gave evidence that from 2005 to 2010 there was a problem with the strata management which was weak and ineffective and many proprietors were not paying maintenance fees or cess. As a result there were insufficient funds to operate the mall.

[92] Mrs. Hendrickson agreed that parking was the main nuisance arising from the church's presence in the mall. The church's presence also did not add to the overall improvement of the mall as a commercial mall. Though some members shop at the supermarket more sales were lost because church members occupy the parking spots for up to four hours taking up much of the parking space.

[93] Her evidence was that it was after the strata commission came to a meeting of the proprietors in 2012 that they became aware of the by-laws and the fact that it was possible to mount a legal challenge to the presence of the church in the mall.

[94] Mr. Gabbidon who gave evidence on the 1st Defendant's case explained that there was a meeting in 2001 at which he was made strata manager and the next meeting was in 2006 to consider audited reports. This meeting he said was held before the church came to the mall. According to Mr. Gabbidon after 2006 up to 2010 there were only two functioning officers; himself and a secretary. There was a representative from the supermarket whose sole function was to sign cheques, although he was not a treasurer. He agreed that before the one in 2006 and the one in 2010 there were no meetings.

[95] He said that parking became an issue from very early and there were several meetings about it of which he could clearly recall three. He said at some point the church agreed to parking spots being designated and coned but then changed its mind. There were constant complaints from shop owners, business people and security about the fact that customers could not find parking spaces when the church was in operation.

[96] He said once the church began operation it became evident that parking was an issue. He noted that there was a growth in the church over time and the mall was really packed on a Sunday. He said he also took specific note of the increase in numbers on a Wednesday. He said the Universal Church was a small church with a quiet operation. There had been no parking problems with the Universal Church.

[97] He also gave evidence that there were complaints about the noise being made by the 1st Defendant. The 1st Defendant also acquired an amplifier which significantly increased the noise in the plaza and there were several complaints about the noise in the plaza. On a Sunday one could hear the praying going on. He also said on a Wednesday he heard praying also but the doors were open at the time.

[98] The matter of the disturbance was raised with him from time to time and was an ongoing problem. Even after the suggested improvements were made there were still complaints. Some proprietors complained that the problem with parking was affecting their businesses. The supermarket was one such. He also recalled Ron Chai speaking to him about it. He recalled too that the complaint was about the reduction in business on a Sunday. He said complaints about noise came from the supermarket, the pharmacy, the security company, Ms Fowler, the hairdresser, and Dr Lycee.

[99] The 1st Defendant's evidence was that a meeting of the strata in 2010 was the first meeting at which an executive was elected since 2005 after the 1st Defendant came to the mall. However, it was aware that Mr. Gabbidon was a member of the executive before it came to the mall. In 2009 attempts were made to call general meetings but attendance was low so nothing could be dealt with in any meaningful way.

[100] The 1st Defendant also gave evidence that disputes arose between some members of the strata over the issue of parking spaces. The evidence given was that efforts were made by the church to solve that problem without reference to the use of the units as a church. The evidence from the 1st Defendant was that the only proprietors who had a problem with the parking allocation were the supermarket and the pharmacy. There was a time as far back as possibly 2006 when two churches operated in the plaza. At the time Universal Church occupied two units 28 and 29 (now occupied by the 1st Defendant) and the 1st Defendant occupied two shops 26 and 27. It was the 1st Defendant's evidence that the first time the operation of the church became an issue was in 2013.

[101] It is clear to me that the restriction on use of the lots was made with the intention to keep the strata as a commercial mall. It is still, with the exception of the operation of the church, a commercial plaza. There can be no question that the 1st Defendant is not operating an office or shop as contemplated in the by-laws. However, they have been in operation for some time and have been allowed to expand by the inaction of the Claimant. They are also not the first to operate a church in breach. The question therefore, is whether the Claimant's inaction can be viewed as acquiescence in the breach and/or whether in light of the delay in bringing this action it is inequitable to grant relief.

[102] I accept that there was no executive in place until 2010 since the 1st Defendant arrived in the mall in 2005. This was agreed by both sides to have been the position. So the first time the corporation actually functioned as it

should since 2005 was 2010. Certainly the fact that the 1st Defendant was allowed to sit on the executive committee since 2010 is a troubling factor. It would suggest acceptance. It would have to pay maintenance by virtue of ownership of the units regardless of user but did they have to sit on the management committee charged with enforcement powers whilst they were in flagrant breach? I think not. But by itself it is not unequivocal evidence of acquiescence. For example another view that could be taken of this is that the corporation was ignorant that the church was operating in breach or even if it knew of the breach, it was ignorant of the fact that there was a legal recourse.

[103] What is clear, however, is that the management committee for most of the period was either absent or weak and ignorant of the rights of the proprietors under the Act. I accept that though the church's presence was a problem no one knew what to do about it. This is evident from the years of complaints, the constant back and forth trying to accommodate the inconvenience and the fact that after the committee became stronger and the strata commission's advice was sought, the management moved with great alacrity to remedy the situation.

[104] It is the executive committee which acts for the corporation. If none is in place there is none to act or omit to act. So without an executive committee in place there was no possibility of a waiver or acquiescence between 2005 and 2010 when a committee was voted into place. A failure in duty by the executive because of ignorance is perhaps a violation of their duty as the executive management committee and where none was in place, a failure of the duty of the proprietors to appoint one. But the violation by the management committee of their duties as managers and their failure to act or act on a timely basis to protect the interest of the strata as a whole cannot thereby prejudice the rights of the proprietors protected by statute. The Claimant cannot thereby be said to be guilty of such delay or acquiescence in the face of its periods of in-operation and abject ignorance, to bar it from its remedy. The 1st Defendant operated with full

knowledge of the objections and there is no element of dishonesty, fraud or unconscionability in the Claimant seeking its relief:

[105] This is a finding which is totally in keeping with the common law and equitable principles applied in the cases. In **Shaw v Applegate** [1977] 1 W.L.R. 970 the plaintiffs were confused about whether there was a breach or not resulting from the defendant's activities so that it could not be said that they were acting dishonestly or unconscionably in seeking to enforce their rights later on. In the case of **Gafford v Graham** [1998] EWCA Civ. 666, the claimant knew what his rights were. He made no complaint to the defendant at the time and treated the conversion of the bungalow and extension of the barn as incidents which were settled as between them although he acted promptly with respect to the riding school and the defendant's current business operations which were beginning to grow on a larger scale. The difference in the application of the principle in both cases was the issue of knowledge and confusion on the part of the claimants as to their actual rights at the relevant periods.

[106] Apart from the fact of the breach of user, the conduct of the 1st Defendant also operated as a nuisance. That is a continuing breach. Each day brings a fresh cause of action. Even though the definition and principle of nuisance is a common law notion, in this particular case, it is a statutory breach. The Claimant brings this claim to protect their very survival in the mall. It is clear from the evidence that there was no acquiescence to the activities of the 1st Defendant or the statutory breaches of nuisance and interference with quiet enjoyment attendant to it. There was always a dispute.

[107] I also cannot find that acts of indulgence, compromise and neighbourly accommodation is equivalent to acquiescence: see also **Peyman v Lanjani** [1985] 1 Ch 457 where it was held that in order to render a party's election to affirm or rescind a contract irrevocable, he had to have knowledge not only of the facts giving rise to the election but also of the right of election itself. See also

Halsbury vol. 16 (2) para. 908. In the case at bar, the Act was amended in 2009 to give it teeth and provided a means by which the corporations could enforce the by-laws in a court of law. There is no evidence that either the Claimant or the Defendants knew of these changes to the law before 2012.

[108] Quoting from Lord Chelmsford L.C. in **Earl of Damley v. Proprietors of London, Chattham and Dover Railway** [1867] L.R. 2 H.L. 43 at 57, Stephenson L.J. in **Peyman v Lanjani** affirmed the old principle that "a waiver must be an intentional act with knowledge." It is clear from the evidence that there had been reservations, if not outright objection to the presence of the church from the beginning. There were several complaints about the attendant activities of a church in the mall, the noise, the parking with efforts being made to exist peacefully. I accept that it is perhaps possible to find that the Claimant knew the 1st Defendant's presence in the Mall was a breach, (however the evidence is not unequivocal in that regard), but I am not prepared to find that it knew what to do about it.

[109] I would Borrow from Romilly M.R. **in Vyvyan v Vyvyan** [1861] 30 Beav. 65 at 74, also quoted in **Peyman v Lanjani**, where he stated:

> *"Waiver or acquiescence, like election, presupposes that the person to be barred is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim".*

[110] The only remaining question is whether the Claimant ought to lose its right to relief because it was ignorant of the said right and chose to be accommodating and neighbourly. It cannot be said that by their inaction they showed an intention to have the mall become anything other than a commercial mall. The authorities unequivocally show that in order to make a choice to act or not to act which would amount to waiver of an existing right, there must be knowledge of that right. See **Young v Bristol Aeroplane Co.** Ltd. [1946] A.C. (HL) 163.

[111] In **Evans v Bartlam** [1937] A.C. 473 (HL) Lord Atkins said at page 479 that it could not be presumed that everyone knows all the laws and rules of the Supreme Court, not even a judge. He went on to point out that this was a different consideration from the maxim "ignorance of the law is no excuse". Any differing view which the House of Lords appear to be giving in statements made by Lord Pearson in his dissenting judgment and Lord Diplock in his obiter dictum, in **Kammins Ballrooms Co. Ltd. v Zenith Investments (Torquay) Ltd**. [1971] A.C. 850, that knowledge of the legal right is not necessary for waiver, conflicts with other decisions of the House and in any event is not applicable to the issues in the present case.

[112] The generally acceptable principle therefore, is that the Claimant must have knowledge that the law gives him a right to act and armed with that knowledge he chooses not to act, thereby waiving that right. From the evidence it is clear that both the Claimant and the 1st Defendant became aware of the legal implications of the 1st Defendant's operation in the mall at about the same time, that is, at the meeting with the Strata Commissioners in 2012. The proprietors then took a vote at an extraordinary generally meeting in September 2012 of 16 to 6, not to amend the by-laws to accommodate the church, following which this claim was filed.

[113] I have already held that the Claimant cannot waive a statutory provision which is not for its benefit alone. In any event, it being a statutory breach, it is within the statute that we must look to see whether it gives an option to choose to continue with the breach or act to stop it. In the case of the Act there is no option to accept the breach. The right to enforce these covenants depends entirely on the statute rather than on the common law or equity. See **Peyman v Lanjani** pages 20 and 21 for examples of statutory provisions which provide an option to choose to act in one way or the other. In cases involving such statutory

provisions, knowledge of the right to choose is essential to the determination as to whether there was a loss of rights.

[114] Again, I will point out that equity follows the law unless it is a vehicle for fraud. The principles I have outlined above are common law principles. Whether there is a waiver or acquiescence at common law is a question of fact based on the intention of the parties to be gleaned by their conduct. Where it is a matter of statutory provisions, it must be determined by the statute. The question of the delay in seeking a remedy is a different matter from the question of acquiescence. Delay by itself does not amount to acquiescence and in the context of the statutory provisions the delay cannot defeat the Claimant's right to relief unless so determined by the statute.

[115] A party also cannot benefit from a waiver, even if it exists, unless it has altered its position in reliance on it: see **Halsbury Laws of England vol. 16 (2)** paras. 907-908. The Defendants have failed to show that there was a waiver, that they relied on it and that they altered their position in reliance on its existence. Therefore, whether I apply the common law principles relied on by the Defendants or the policy of the statute relied on by the Claimant, I find that there has not been any acquiescence or waiver of the Claimant's right to enforce the by-laws.

Should an Injunction be granted?

[116] The relief sought by the Claimant is in the form of an injunction. Section 18 (2) of the Act provides that the court may grant an injunction where it is satisfied, on receipt of an application of the corporation, that a proprietor has contravened any of the provisions of the by-laws set out in paragraph 1 of the 1st schedule or any of the by-laws set out in the 2nd schedule. The Act, therefore, also provides for the relief to which the Claimant is entitled in the case of a breach. The Act also provides for a pecuniary penalty of a maximum of one

million dollars ($1,000,000.00) payable to the corporation together with or instead of an injunction.

[117] The Act also provides a list of the factors which the court must consider in deciding whether to grant an injunction or penalty or both. Section 18 (3) states;

> (3) In exercising the powers referred to in subsection (2) the court shall consider-
>
> (a) the nature of the default of the proprietor;
>
> (b) the nature of any loss or damage suffered by any person as a result of the default;
>
> (c) the circumstances of the default;
>
> (d) any previous determination in relation to a breach of the by-laws, against the proprietor to whom the application relates.

However, I still bear in mind that the grant of an injunction is a discretionary remedy to which the Act pays homage by the use of the words “may grant an injunction”.

[118] In this case, the nature of the default is very serious. There is a church operating in a commercial mall zoned for shops and offices. This is a serious difference in user. The attendant result of its very presence in the mall is also very serious. The results are excessive noise, inadequate parking, un-supervised children roaming the mall and constant disputes with neighbouring proprietors. The evidence was that this has resulted in a fall off in sales for some of the other proprietors. The church bought units outright and rented others. It started small and gradually expanded. Its membership has also grown. The proprietors of the strata plan have since voted not to change the by-laws to accommodate a church operating in the commercial mall. This is to be juxtaposed against the evidence of the circumstances of the breach; the fact that they have been in the mall for some time and that efforts at accommodation had been made by the executive committee.

[119] In making a decision on an application for a permanent prohibitory or mandatory injunction, the court is usually guided by certain factors established in case law as being of particular relevance. Therefore, I do not consider the factors listed in section 18(3) to be exhaustive or inconsistent.

[120] Firstly, equity rules that an injunction will not be granted where damages are an adequate remedy. The Act pays homage to this principle of course where it provides for a pecuniary penalty instead of an injunction. In this case the Claimant has sensibly not pursued a claim for common law damages. Neither has it made any claim for the pecuniary penalty. In the circumstances of this case, I find that damages would not only be an inadequate remedy and would be nigh impossible to quantify, it is also not available to the corporation under the statute. In any event, I do not believe money would adequately compensate for the continued fall off in business opportunities to the proprietors of the mall caused by the parking and noise nuisance, resulting from the presence of the church in the mall. It is also clear that the Claimant does not want money; it wants the mall to remain a commercial mall. Therefore, the pecuniary penalty would not be apt in this case.

[121] An injunction will be granted to protect an existing right recognized by law where it cannot be held against the Claimant that any rule of equity can be invoked so as to cause him to be denied his claim to his legal rights. In **Richard Wheeler Doherty v Allman** [1878] App Cas 709, the court recognized that as a general rule, where there are negative covenants binding on a defendant, it was a well settled practice that the court of equity had no discretion to consider the balance of convenience or factors of that nature but is bound to give effect to the covenants, unless the claimant by his own conduct becomes disentitled to sue. The principle may be stated that if parties contract not to do a thing, the court of equity only has to say by way of injunction that the thing ought not to be done. The court by way of the injunction would only be sanctioning that which was a contract between the parties. The question of balance of convenience or

inconvenience, the amount of damage or injury would be redundant. This principle was approved in **Osborne v Bradly**.

[122] It has been held that a perpetual injunction will be granted 'as of course' to restrain the breach of a valid negative covenant. (See **Doherty v Allman)**. The same principle will apply to by-laws that also contain negative covenants. The Court of Appeal of Jamaica in the case of **Trevand Manufacturing Co Ltd v Stoeckert** [1990] 27 JLR 340 at p.347, (para. I) recognized in principle that where activities on land conflict with a restrictive covenant as to user, the only safeguard against the continuation of such a breach of covenant was by way of a permanent injunction. That being said, a by-law which prohibits the use of a mall as a church and prohibits the use in a manner which causes a nuisance to the other proprietors of the strata, are examples of negative covenants. These are breaches which, if found to exist, can be barred indefinitely by way of a permanent injunction; providing there is no defence available to the Defendant.

[123] A claimant who has overcome all possible equitable and legal defences is prima facie entitled to an injunction unless there is some other reason why a court, in its discretion, should refuse the injunctive relief. In this case, the Defendants have claimed that the Claimant should not be granted an injunction because they have operated in an unfairly prejudicial and oppressive manner towards them and especially the 1st Defendant.

[124] In the case of **Jaggard v Sawyers** [1995] 1 WLR 269, the court suggested the approach to take when considering the exercise of a discretion to grant an injunction. This approach may be summarized thus;

1. Damages ought to be granted instead of an injunction if to do so would be oppressive to the defendant.

2. In considering an injunction the court should not slide into the application of a general balance of inconvenience test; but oppression had to be judged as at the date the court made the grant and the court should not ignore the reality with which it was confronted.

3. The fact that no interlocutory relief or declaratory relief was sought by the defendant was relevant but not decisive.

4. There would be no oppression if the defendant had acted in blatant disregard for the plaintiffs rights.

[125] The working rule suggested in **Jaggard v Sawyers** is to consider whether the injury to the claimant's legal rights was small; was it capable of being estimated in money; could it be compensated by a small money payment; And would the grant of an injunction be oppressive?

[126] I will now go on to apply that approach to this case.

The allegations of fraud, oppression and unfair prejudice

[127] The Defendants allege that the Claimant has acted oppressively towards them in bringing this claim. They rely on several factors to support this assertion. Firstly, they claim that the Claimant was selective in the enforcement of the by-laws as they themselves were in breach. They accuse the Claimant of parking supermarket trolleys on the common area in breach of the by-laws and of allowing a business entity to occupy and operate from a space in the common area also in breach (that is, the drive-through area operated by the food establishment).

[128] The evidence given by the Claimant is that it occupies a small space in a corner of the common area for parking of its trolleys and this is done with the permission of the executive committee. It also indicated that the fast food outlet which occupies one unit on rental from the supermarket operates a drive-through on part of the common area at the side of the building, also with the permission of the executive committee. This permission was granted after plans were drawn up and submitted and letters were written to the strata seeking permission. She indicated the area for the drive-through is not large enough for parking and is merely a driveway. There is no food court in the mall. She also

indicated that this arrangement (renting out sections of the common area) was not unusual as the bank had an ATM and a generator, also on the common area, with permission and the payment of rent to the strata.

[129] The area used up by the fast food company was said to be about the size of two parking spaces but the Claimant asserted that the benefit of their presence far outweighed the loss of two spaces as there was no food court in the mall.

[130] There was further evidence that there was a cess leveled against unit owners in 2011. This was for the purpose of fixing the mall. This was after the new executive was put in place after many years in abeyance. A member from the church was also on the executive at that time. Though the church agreed to the cess and made initial payments they have not made any further payments since then. The executive member representing the church, Mr. Griffith, was asked to resign because of conflict of interest once the claim by the executive committee was instituted. He refused to comply. But the 1st Defendant complains that other members of the executive who are in conflict with the committee, for example over the non-payment of maintenance and the cess had not been asked to resign.

[131] The 1st Defendant also alleged that the Claimant's action was unconscionable because it is the parking issue, which affected the Claimant's witnesses more than most, which led to this claim. In that regard the 1st Defendant asked the court to infer that this was an unfair and capricious exercise of that power especially since the supermarket is also in breach of the by-law governing the use of the common area.

[132] The Defendants claim that a letter from the corporation under the signature of Dr. Lasisi on March 6, 2013 was the first notice to the 1st Defendant that it was in breach of the by-law as to user. This they say is to be contrasted

with an earlier letter from Mrs. Hendrickson which complained of the parking but did not mention the breach of use by the church. They also allege that the Church's objection to the corporation's exercise of its power to sell the lots of delinquent owners was also one of the motives for the Claimant moving against them for breaches of the by-laws. The fact is that Mrs. Hendrickson's letter of 2010 is most illuminating. Whilst she complained of the growth of the church and its membership, the disadvantageous effect it had on parking, the efforts at accommodation, it also spoke to the fact that a church in a mall is not a normal or ideal location. It is also clear that despite her concern in this regard, which she openly stated, it is clear from the letter that she was at the time of writing ignorant that the operation of the church in the mall was an actionable breach. I say this because from the tone of the letter and the mention of the abnormal presence in the mall, if she had known of the actions that could be taken against this abnormal presence, I am certain that this too would have been noted. The effect of Dr. Lasisi's letter is to underscore that that knowledge came much later.

[133] The Claimant, whilst admitting that there had been arrears of maintenance, told the court that all but two of the proprietors had paid up their maintenance arrears. They did not state who those two were and were not asked to do so. The Court will not speculate, (as it is being asked to do by counsel for the 1st Defendant) whether a member of the executive committee is one of the delinquent ones.

[134] Equity follows the law and the principle is that statute will be obeyed. Whilst equity will not generally contradict the law and especially statutory provisions it will act against the conscience of individuals who act unfairly, illegally and unconscionably. Therefore the Claimant will not obtain an injunction if it would be inequitable to grant it. Bearing in mind the state of the Claimant prior to 2010, the changes in the law with regards to strata, the advice received from the strata commission which the Claimant wasted no time in acting on, I

cannot come the conclusion that the Claimant so acted in the past as to disentitle them to the relief sought.

[135] In the circumstances, it is the view of this court that the exercise of its discretion to grant a permanent injunction to prevent further breaches would be necessary in all the circumstances where there have been breaches of the by-laws. In this particular circumstance, I have to consider the position of the Claimant who has a right and indeed a duty to enforce the valid by-laws in the interest of all the proprietors and the perceived hardship to the church which will no longer be able to operate from the mall.

[136] Having given this case grave and weighty consideration, I believe the case for an injunction has been made out. The 1st Defendant knew the mall was a commercial mall before it entered. It knew it was a church operation. When it purchased the unit it was given the by-laws. It ought to have known it was acting in breach of those by-laws at most and at least that a church in a mall is not normal, usual or ideal. It proceeded to act as a nuisance and though efforts were made at accommodating its presence it seized to co-operate by insisting on its supposed legal rights as a proprietor. Damages are not an adequate remedy. The wish of the Claimant is to prevent the breach not to seek compensation for committing the breach.

[137] I have considered the possibility of hardship with respect to the Defendants and especially the 1st Defendant. The years of operation have not resulted in any substantial alteration in the condition of the 1st Defendant. When they entered the mall they had already purchased two units in a private treaty. It was a done deal. As owners of those units the use to which it was put was entirely their choice. They knew they bought into a commercial mall. If the church was to cease operating in the mall it would result in little or no effect on the units themselves. They could be sold or rented. Of course the church congregation is large but so are a lot of other churches which do not function in

a mall. I only mean to say, church services may be held anywhere that there is no restriction on use, for example an actual church building, a house or a hotel meeting room. For a church, the possibilities are endless. Therefore to remove from the mall at this time creates no hardship for the 1st Defendant. The rental on the other units may be terminated with notice or used for other allowable purposes.

[138] To the same extent, there is no hardship on the 2nd Defendant who may find some other tenant or who may continue to allow the church to rent his unit for the purpose of an office or shop. It is not oppressive to the Defendants to grant an injunction. There is no claim for damages and none could have been sustained by the Claimant. The Act provides for a pecuniary penalty but in the circumstances it is difficult to see how that would solve the issues in this case. The church would continue and so would the nuisance. The court would have acted in vain since the parties would be in the same position they were in before, the dispute would still exist and the penalty payment to the corporation would not only have not solved anything but would not be compensatory to any of the proprietors suffering as a result of the Defendants' breach.

The Counterclaim

[139] Both Defendants filed counterclaims**.** The counterclaims are in the same vain for both. The Defendants have counter claimed that the valid by-laws are those in the 1st schedule of the Act (the default by-laws). I have already ruled in favour of the Claimant on that point.

[140] They also claim an injunction to compel the Claimant to enforce the by-laws by ordering the supermarket to remove the trolleys parked on the common area and Island Grill, their tenant, to remove the drive through, which they allege is in breach of the by-law.

[141] By virtue of section 10 of the Act, the common property is held by the proprietors as tenants in common in shares proportional to the unit entitlement of their respective strata lots. The implication of this is that the general law affecting the operation of tenants in common would apply unless otherwise stated in the statute. This means that a tenant in common has no right to exclude a co-tenant from the property owned by them in whatever shares. However, the Act provides for lawful steps to be taken to circumvent the general rule. Section 11 provides that the proprietors may by unanimous resolution direct the corporation to transfer or lease the common property or any part thereof. All persons who have interests in the parcel to be transferred or leased must consent to it. Section 12 provides for the corporation to grant by unanimous resolution an easement or restrictive covenant or receive one with the consent of all those with an interest in the parcel to be affected.

[142] These are the only means by which exclusive use of the common area can lawfully be achieved. In this case there has been no exercise or purported exercise of that power. The Defendants are not saying it is an exclusive user however, instead they contend that the use of the space is in breach of by-law 1(d). I will repeat 1(d) here. It states that "a proprietor shall use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other proprietors or their families or visitors." The Defendants, save and except for saying it is a breach, have not indicated in what way the use of the area to park trolleys and the drive-through has unreasonably interfered with their use and enjoyment.

[143] There is also no evidence whatsoever, that the proprietors who are entitled to use the common areas are doing so in breach of the by-law 1(d). Both the supermarket and Island Grill are commercial enterprises, so their activities are not in breach of the by-laws. There is no evidence that the placing of the trolleys on the common area is an interference with the quiet enjoyment of any of the proprietors nor is it a noise nuisance. The same goes for the drive through

to Island Grill. There is no evidence that the existence of the drive through unreasonably interferes with the quiet enjoyment of the Defendants. They have merely asserted it is a breach of by-law 1(d).

[144] In a commercial mall with a supermarket and food establishment, it is expected that in modern commercial usage there may be a drive-through, not only for a food court but even for a bank if there was one. Neither is there evidence that the drive-through restricts users such as the other proprietors. Certainly the placement of trolleys in a conspicuous corner for use of customers is also not unusual and is an expected and reasonable use of common area in a commercial setting. It would no doubt be different if it was a residential strata.

[145] In the absence of any averments which can amount to proof by the Defendants, I hardly think any authority is required to justify this decision. But in case it is so desirable to present authorities on the point, I found the case of **Platt v Ciriello** [1998] 2 Qd R 417, a case from the Supreme Court of Queensland in the Court of Appeal quite persuasive. The decision was based on an application arising from the operation of a commercial strata plan. The issue in that case posed similar issues as in this case. Lot owners shared common property as tenants in common as per the provisions of the Building Units and Group Titles Act 1980. The issue surrounded the use of the common property at the front by the restaurant to place chairs and tables and the posting of signs by the pharmacy amongst other things. All were legal uses by those entitled to use the common area. The Court by majority found that the exclusive use clause in section 51(section 11 and 12 in this case) were not applicable as there was no exercise of that power and that the power of the corporation to manage and control the common area was subject to the right of the tenants in common to use the common area reasonably so long as it did not interfere with the quiet enjoyment of those also entitled to its use. The majority also found that, to the extent that all were entitled to lawfully use the common area, every such use by a proprietor necessarily would exclude another from so using the same

space at the same time. To that extent, it was for the respondent to show that the use interfered with his quiet enjoyment.

[146] Ambrose JA holding with the majority declared on authority, that nothing less than the establishment by the respondent that there was a real and substantial interference with their use and enjoyment of the common property would suffice.

[147] In the instant case, implicit in by-law 1(d) is the right of each proprietor to use and enjoy the common area. The corporation cannot in exercise of its management functions interfere with that right unless the user amounts to an unreasonable interference with those who are also entitled to its use. If the Defendants' right to use any part of the common property is substantially impeded or interfered with, it gives them a cause of action in nuisance and the success of that action depends on their ability to prove unreasonable use amounting to a real and substantial interference.

[148] I gratefully adopt the judgments of MacPherson JA and Ambrose JA in **Platt** as persuasive in their interpretation of sections 51 (1) and section 30 (7) (a) of Building Units and Group Titles Act of Queensland which is quite similar in wording and effect to by-law 1(d) and section 11 of the Act respectively. Even within the dissenting judgment of Pincus JA there was the acceptance that impermanent placement of objects on the common area such as tables and chairs was not an exclusive user, as it was prima facie lawful and did not amount to an ouster of others rights to use the common area. It did not amount to a taking of the common area for exclusive use.

[149] The Claimant's evidence was that permission was granted by the Executive Management Committee for such user. That may well be so. But that permission was not within section 11 or 12 of the Act as to the grant of exclusive use and no such grant has been averred or proved. They may have been acting under schedule 1 (3) (e) of the Act which gives right to the corporation to agree

to provide amenities or service to a proprietor or occupier. This is however, subject to such provision not being in breach of the Act or the by-laws. No such breach having been proved, the counterclaims of the 1st and 2nd Defendants on this issue are without merit and both must fail. The 1st Defendant also has not come with clean hands on this particular issue, since it is the evidence that the church sign sits atop one of the units and occupies what is generally regarded as common space which it has refused to remove despite requests to do so.

[150] The Defendants have also sought declarations that the Claimant breached its statutory duty in the enforcement of the by-laws and/or has enforced them in a manner unfair, prejudicial and oppressive to them. They also allege that the Claimant is enforcing the by-laws in their own self-interest and is a fraud on the power. They also claim a declaration that it would be inequitable to permit the Claimant to enforce the by-laws 1(d), 1(e), 2 (a), and 2(e), against them.

[151] There is no section in the Act governing this particular situation, however, as counsel for the Defendant supported her contentions with authorities, I will say a few words as to why I reject the application of those authorities to this case.

[152] The Act was amended at the end of 2009. It introduced several new provisions. These amendments made several changes to the Act. One of those far reaching changes was the introduction of what is now section 18 subsection (2) and (3) which effectively gave the Claimant the power to bring this claim. It provides for the manner in which Corporations are to register with the new Strata Commission which the amendments also introduced for the first time and mandates developers to inform prospective purchasers of matters concerning the strata lots. It also provided for the corporation to act in the case of a failure to pay the contribution levy in a manner prescribed and most importantly to act by selling the strata lot involved by public auction. It also provides for an appeal

process. Therefore none of the actions of the corporation complained of are illegal.

[153] As previously noted, by virtue of section 4 of the Act, it is the proprietors of the strata upon registration which become a body corporate. Subsection 3 exempts the body corporate from the provisions of any enactment regarding incorporation, regulation or winding up of companies. It also exempts individual proprietors from suit for any action taken under the provisions of the Act. Section 5 provides for the duties of this body corporate. It includes insuring the strata property, to keep it in a state of good repair and to properly maintain the common property and so on. Its powers are prescribed in subsection 2. It includes establishing a fund for administrative expenses and determining from time to time what that amount ought to be, to recover money expended, to enter any lot to effect repairs and to exercise a power of sale in respect of delinquent strata lots in accordance with the provisions of the Act. It also has the power to seek possession of a delinquent lot for rental where the proprietor cannot be found, in order to recover the outstanding contributions.

[154] Section 9 subsection 6 provides that the corporation shall make the by-laws available for inspection upon request from a proprietor. It is the 1st schedule which provides for the Executive Committee. It provides for an Executive Committee to exercise the powers and carry out the duties of the corporation. These persons are to be elected. It must consist of no less than three and no more than nine proprietors. The 2009 amendments therefore brought far-reaching changes to the strata operation giving the corporation more teeth, so to speak, in the management and control of the strata.

[155] The corporation has the power to make an agreement with the proprietor or occupier of any strata lot for the provision of amenities or services by it to such strata lot or to the proprietor or occupier thereof. The question therefore is whether the exercise of that power given under schedule 1 of the by-law in

allowing the supermarket to park trolleys and the Island Grill a drive-through is a fraud on the power.

[156] Schedule 1(2) (a) provides that the corporation shall control, manage and administer the common property for the benefit of all proprietors and in (f) do all things reasonably necessary for the enforcement of the by-laws and the control, management and administration of the common property. The issue also on the counterclaim is whether it has failed in its duty to do so.

[157] As previously stated counsel cited several cases in support of the Defendants contention. The first was **Lin and Lin v The Owners-Strata Plan No. 50276** [2004] NSWSC 88, a case which dealt with the refusal by the corporation to grant a proprietor access to the common property (exhaust ventilation system which was overburdened) under its power of management and control. It is difficult to see how this case is relevant to the matter before me, since the grant of permission or the turning of a blind eye to the use the common area for a drive-through and parking of trolleys do not equate to the refusal to allow or the exclusion of the Defendants or any other proprietor from access to the common area and in particular those parts of the common area.

[158] The drive-through has not been shown to interfere with the Defendants' use or enjoyment of the common area, neither have they shown that they have been denied access to those areas. There is no evidence of any previous complaints in this regard prior to the Claimant's claim. The same goes for the areas with the supermarket trolleys.

[159] Since there is no evidence that the areas have been appropriated for the exclusive use of the supermarket and Island Grill, neither has it been shown that the Defendants have been unlawfully refused access to these areas, there is no fraud on the minority as principled in **Lin and Lin**. May I here pause to note that **Platt** is cited in **Lin** and **Lin** but Gzell J in giving judgment in **Lin and Lin** stated

his preference for the dissenting judgment of Pincus J.A. on the issue of exclusitivity. For my part, whilst I accept the result in **Lin and Lin** as the only reasonable and rational one in the circumstances of that case, the facts are different from the one before me and it is therefore not applicable. I also reject the interpretation and application of the relevant provisions of the Building Units and Group Titles Act of Queensland by Pincus J.A.

[160] Counsel also cited **Young v Owners Strata Plan No. 3529** [2001] 54 NSWLR 60 and **Wayne Lawrence Houghton v Immer** (no**.**155) Pty (1997) WL 1880931. In **Young,** the corporation proposed to make a by-law limiting the use of the common property to residential owners only. The Claimant owned lots which conferred rights to parking and the right to use a swimming pool only but he was not a resident. The proposed by-law would exclude him from the right to use the common property altogether not being a resident. It was held they had no power to do so without his consent as the person affected in accordance with the provisions under the legislation which required a unanimous resolution and the consent of those affected.

[161] Again, this case is not applicable to the one before me. In the instant case the corporation has exercised no power to provide exclusive access and has not purported to have done so. What they have done is granted an amenity or a service to a proprietor as per the power to do so under the schedule. The service or amenity thus provided has not been shown to contravene by-law 1(d). Even if I am wrong that permission can be granted as per schedule 1 (2) (e), each proprietor has the right to use and enjoy common property as long as it is not unreasonable and does not interfere with the use and enjoyment of others so entitled. Unless such user is in breach, the corporation has no power to prevent it. The Claimant therefore, cannot be said to be in breach of any statutory duty to act.

[162] In **Wayne Lawrence Haughton & anor v Immer,** which was applied in **Lin and Lin** and **Young**, the notion of fraud on the minority borrowed from corporate law was imported into the law of real property. The principle, as applied, is that where there is a valid exercise of power which destroyed the equitable rights of the claimant, that destruction was a fraud on the power. It is a fraud not because it is dishonest or fraudulent in the common law sense as we know it, but because it is a proper exercise of the power with an intent which goes beyond the scope of the power. In that case there was a subdivision of the common property by members of the corporation for their own benefit to the exclusion of the claimant. The common property had value and the special resolution to subdivide and transfer by some lot owners was a fraud on the minority being led by personal gain.

[163] In applying corporate law principles to the case, the court found that the creation of an association of persons or corporation in an analogous way to that created by the companies' legislation means there is no reason why such a doctrine should not apply to them. They went on to find that the body corporate was no different from directors of a corporation who owe fiduciary duties to their company. In the same way directors were not entitled to make presents to themselves of company shares, the members of the committee of the corporation was not entitled to transfer onto themselves part of the common property.

[164] In this case, Mrs. Hendrickson is affiliated to the supermarket and is a member of the executive committee mandated to carry out the acts of the corporation. The said supermarket which is said to be parking trolleys on the common area and which is the landlord for the Island Grill. For this reason the Defendants claim the Claimant is acting in its own self interest and fraudulently. This is an unsustainable averment by the Defendants and especially the 1st Defendant, it being the 2nd Defendant's tenant. The 1st Defendant is also on the executive committee. The fact that a representative of the supermarket is on the

executive does not mean the supermarket cannot reasonably use the common area without being accused of appropriation and fraud.

[165] I will only say that if the corporation and by extension the executive members are viewed as fiduciaries, then in any situation where a benefit is to be conferred by them, and by this I include giving permission to do a thing also, then they are required to act lawfully and in an open and transparent manner. The evidence was that letters were written and permission sought and granted. The Defendants have not shown or raised any evidence to support their claim of self interest or fraud on the minority.

[166] In this case whilst a good deal of evidence and an equal amount of submissions was devoted to the motive of the corporation through its executive committee in bringing this claim there was no motive given by the Defendants of the exercise of the power to grant the amenities or the services other than self interest. This does not show irrefutably an intention beyond the scope of the power to destroy the Defendants interest in the common property so utilized. On the authorities provided by counsel for the Defendants, this is what is required of the Defendants to prove in order for them to succeed. They have not demonstrated that they were or are in any way adversely affected in the use and enjoyment of their rights over the common property as lot owners or that their rights have been nullified or oppressed. There was no fraud on the minority.

[167] In any event I will reiterate that implicit in by-law 1(d) is the right of every proprietor to use the common area subject only to it not being done in a manner to interfere with the quiet enjoyment. There is no evidence of such interference.
In the circumstances, I find that the Defendants' Counter Claim must fail.

Conclusion

[168] By virtue of 9 (8) of the Act, the by-laws shall bind the corporation and the proprietors who are to observe and perform all the provisions of the by-laws. The by-laws therefore exist in order to ensure that the covenants in any given strata plan are adhered to. The court, in recognition of the need for adherence to the by-laws of a particular strata plan, may grant an injunction or give a pecuniary award or both.

[169] In this case there is no evidence of any conduct by the Claimant which would cause this court to deny the Claimant the injunction it seeks. This court is of the view that where there has been a breach of a strata by-law, this may be enforced by the court by way of a permanent injunction to prevent further breaches. The issue being a statutory one and the by-laws having been given equal force as a matter of public policy, neither the proprietors nor the corporation can contract out of, or waive its effect except as provided by the Act or the by-laws themselves.

[170] Having sought an injunction, as provided by the Act, it is the considered view of the court, that the Claimant is not only entitled to an injunction but has not done or omitted to do anything which would bar it from getting the relief sought.

Disposition

[171] The Claimant's claim succeeds. The 1st and 2nd Defendants counter claim is without merit and therefore must fail. The Court therefore orders that;

1. There is judgment for the Claimant against the 1st and 2nd Defendants on the claim and counterclaim with costs to be agreed or taxed.

2. The 1st Defendant is restrained by itself, its servants or agents from operating the strata lots numbered 24, 27, 28, 29 and 30 being strata lots registered at volume 1187 Folios 865, 868, 869, 870, and 871 of the Register Book of Titles other than as an office or shop.

3. The 2nd Defendant is restrained by himself, his servant or agent from using or permitting his premises strata lot 24 of the strata plan 305 otherwise known as the Red Hills Mall to be used other than as an office or shop.

4. Liberty to Apply.